In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 217

SANFORD A. SCHAFITZ, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner seeks review of an order of the court of appeals (Pet. 1–A) affirming without opinion the Federal Communications Commission's refusal to accept his application for a radio station license. We submit that the Commission and the court acted correctly, that no issue of general importance is presented, and that plenary review by this Court is not warranted.

1. On March 25, 1964, the Commission denied the license renewal application of WWIZ, Inc., a corporation personally controlled by petitioner, for operation of radio station WWIZ at Lorain, Ohio; it also

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denied petitioner's application for transfer of control of WWIZ, Inc. from himself to the Lorain Journal Company. *WWIZ, Inc.*, 36 F.C.C. 561, rehearing denied, 37 F.C.C. 685. These rulings were based on the Commission's findings, made after extensive administrative proceedings, that the activities of petitioner and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission, contrary to Section 310(b), 47 U.S.C. 310(b), of the Communications Act and by the Commission's rules, and that petitioner had breached his duties and responsibilities to the Commission by misrepresenting and withholding information from it pertaining to this transaction. The court of appeals upheld the Commission's findings and affirmed. *Lorain Journal Co.* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A. D.C.). This Court denied certiorari on April 4, 1966 (383 U.S. 967), and on May 16, 1966, denied a petition for rehearing (384 U.S. 947).

Within a few days of the final disposition of that case by this Court, the Commission, on May 19, 1966, invited applications for authority to construct and operate a station at Lorain to replace WWIZ. Among others, petitioner applied. His application was filed in his own name, not his corporation's. Noting that he had been found unqualified in the prior proceeding, the Commission, relying on its Rule 1.519(a), 47 C.F.R. 1.519(a),[1] dismissed the application on the

[1] Rule 1.519(a) prohibits an unsuccessful applicant for a new station or for any modification of services or facilities from submitting a like application involving service of the same kind

ground that it could "only serve as a vehicle for relitigating matters previously decided." *Lorain Community Broadcasting Company,* 5 F.C.C. 2d 55, 57. By a *per curiam* order entered on March 9, 1967, the court of appeals granted the Commission's motion to affirm.[2]

It is evident that by immediately filing a new application in his own name, rather than in the corporate name of his personal enterprise, petitioner was seeking to reopen the earlier proceeding which fully resolved the question of petitioner's qualification to operate a radio station in Lorain, Ohio. When an application for a radio station license in no way materially differs from an earlier application which was denied in a completed proceeding in which the applicant's qualifications were found unsatisfactory, the Commission should be permitted, in the interests of effective regulation, to dismiss the new application without the formality of full evidentiary hearings on the merits. *Public Service Television, Inc.* v. *Federal Communications Commission,* 317 F. 2d 900 (C.A. D.C.); Commission Rule 1.519(a), 47 C.F.R. 1.519(a); cf. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205. Neither Section 309(e) of the Communications Act, 47 U.S.C. 309(e), nor considerations of fair procedure, require the Commission to conduct wholly re-

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to substantially the same area either in his own name, or that of his successor or assignee, or for the benefit of the original parties in interest, within twelve months of the effective date of the Commission's action.

[2] The procedure is similar to that prescribed by this Court's Rules 16(1)(c) for deciding appeals without oral argument.

dundant proceedings. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476.

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

JULY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967